PANCARAN NILAM (M) SDN BHD

v.

MALAYAN BANKING BHD

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
MOKHTAR SIDIN JCA
DENIS ONG JCA
[CIVIL APPEAL NO: W-02-595-1995 & W-02-582-1995]
21 SEPTEMBER 2000

***LAND LAW**: Charge - Deed of assignment - Whether amounts to equitable charge*

***LAND LAW**: Charge - Deed of assignment - Whether assignment absolute - Difference between assignment and absolute assignment - Whether procedure applicable in enforcing rights of assignee different - Rules of the High Court 1980, O 31, O 83*

***LAND LAW**: Charge - Deed of assignment - Absolute assignment - Default by assignor in repayments - Rights of assignee - Procedure applicable - Rules of the High Court 1980 O 31, O 83*

The first defendant purchased five units of apartments ('the property') and in order to finance them took up a term loan from the plaintiff. As security for the said loan, both defendants entered into a loan agreement cum assignment ('the agreement') with a power of attorney to transfer or deal otherwise with the property. The defendants failed to service the loan and the plaintiff took out an originating summons against both defendants seeking to sell the property. The originating summons was taken out pursuant to O. 31 r. 1 of the Rules of the High Court 1980 ('RHC') whereby the plaintiff prayed that the property be sold by public auction. At the hearing the defendants raised the preliminary objection that the prayer for sale under O. 31 r. 1 of the RHC was not correct and that the correct procedure was under O. 83 of the RHC.

Among the issues for consideration were: (a) whether the agreement was an assignment or an absolute assignment; (b) whether there is a difference between the procedures applicable in enforcing an assignment and an absolute assignment; and (c) whether there is a difference between an assignment and a charge.

Held:
Per Mokhtar Sidin JCA

[1] On the facts of the case, the assignment was absolute. An assignment, whether absolute or otherwise is an equitable charge. However, when it is an absolute assignment, it ranks higher than a charge and the property is transferred absolutely to the assignee if the assignor defaults in making the repayments. As such the assignee can do anything with the property once notice of default and notice to remedy has been given to the assignor.

[2] The distinction between O. 31 and O. 83 of the RHC is that under the latter there is a requirement for the chargee to claim possession first before an order for sale. However as to the order of sale itself, whatever conditions and directions as to the sale which are applicable under O. 31 are also applicable to a sale under O. 83 of the RHC.

[3] An absolute assignment therefore is in a stronger position than a charge. The sale of the property under an absolute assignment by way of O. 31 of the RHC was therefore the proper and correct procedure in the instant case.

[Appeal dismissed.]

*[**Bahasa Malaysia** Tranlation Of Headnotes]*

Defendan pertama membeli lima unit pangsapuri ('hartanah tersebut') dan untuk membiayai pembelian tersebut, mereka mengambil satu pinjaman berjangka daripada plaintif. Sebagai jaminan untuk pinjaman tersebut, kedua-dua defendan memasukki satu perjanjian pinjaman dan serahanhak ('perjanjian tersebut') dengan satu surat kuasa wakil bagi memindah atau berurusan dengan hartanah tersebut. Defendan-defendan telah gagal untuk membayar pinjaman dan plaintif telah mengeluarkan satu saman pemula terhadap kedua-dua defendan untuk menjual hartanah tersebut. Saman pemula itu dikeluarkan selaras dengan A. 31 k. 1 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT') dimana plaintif memohon agar hartanah tersebut dijual melalui lelongan awam. Semasa pendengaran, defendan membangkitkan satu bantahan awal atas alasan bahawa permohonan untuk jualan dibawah A. 30 k. 1 KMT tidak betul dan prosedur yang betul sepatutnya dibawah A. 83 KMT.

Antara isu-isu yang dibangkitkan untuk pertimbangan adalah: (a) samada perjanjian tersebut adalah satu serahanhak atau serahanhak yang mutlak; (b) samada terdapat perbezaan diantara prosedur yang digunapakai dalam menguatkuasakan sesuatu serahanhak dan satu serahanhak yang mutlak; dan (c) samada terdapat perbezaan di antara serahanhak dan gadaian.

Diputuskan:
Mokhtar Sidin HMR

[1] Berdasarkan fakta kes, serahanhak ini adalah mutlak. Sesuatu serahanhak, samada mutlak atau tidak adalah satu gadaian ekuiti. Walaubagaimanapun, apabila ianya merupakan satu serahanhak mutlak, ia terletak lebih tinggi daripada gadaian dan haratanah tersebut dipindahmilik secara mutlak kepada pemegang serahhak apabila pemberi serahhak gagal membuat bayaran balik. Dengan itu pemegang serahhak dapat berbuat apa saja dengan hartanah tersebut apabila notis ingkaran dan notis untuk remedi diberikan kepada pemberi serahhak.

[2] Perbezaan di antara A. 31 dan A. 83 KMT ialah dibawah A. 83, terdapat satu syarat dimana pemegang gadai hendaklah terlebih dahulu menuntut milikan sebelum mendapat perintah untuk jualan. Walaubagaimanapun, setakat perintah untuk jualan itu sahaja, apa-apa syarat dan arahan-arahan mengenai penjualan yang digunapakai pada A. 31 terpakai juga untuk jualan dibawah A. 83 KMT.

[3] Sesuatu serahanhak yang mutlak dari itu berkedudukan lebih kuat daripada sesuatu gadaian. Penjualan hartanah tersebut dibawah serahanhak yang mutlak melalui A. 31 KMT dengan itu merupakan prosedur yang sesuai dan betul dalam kes ini.

[*Rayuan plaintif ditolak*.]

Case(s) referred to:
Chuah Eng Khong v. Malayan Banking Bhd [1999] 2 CLJ 917 ***(dist)***
Hipparion (M) Sdn Bhd v. Chung Khiaw Bank Ltd [1989] 2 MLJ 149 ***(foll)***
Koperasi Rakyat Bhd v. Harta Empat Sdn Bhd [2000] 3 CLJ 719 ***(dist)***
Malayan Banking Bhd v. Zahari Ahmad [1988] 2 MLJ 13 ***(dist)***
Mehadevan & Anor v. Manilal & Sons (M) Sdn Bhd [1984] I MLJ 266 ***(dist)***
Phileo Allied Bank (M) Bhd v. Bupinder Singh Avatar Singh & Anor [1999] 2 CLJ 1023 ***(dist)***
Raju Jayaraman Kerpaya v. Chung Khiaw Bank Ltd [1997] 3 CLJ 216 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 4(3)
Rules of the High Court 1980, O. 31, rr. 1, 2, 3, 4, O. 33, O. 83

For the appellant (W-02-595-95) - Satharuban Sivasubramaniam; M/s Satha & Co
For the appellant (W-02-582-95) - Ramdas Tikamdas; M/s Siva, Ram & Assoc
For the respondent - Shamsul Bahrain Ibrahim; M/s Samad Din & Partners

[Appeal from High Court, Kuala Lumpur, Originating Summons No: S4-24-669-94]

Reported by Mariette Peters-Goh

JUDGMENT

Mokhtar Sidin JCA:

These two appeals were heard together. It is clear to us that these appeals originated from the same originating summons, namely Saman Pemula No. S4-24-669-1994. From the record it is clear to us that the learned trial judge heard the originating summons as one and gave only one decision and one ground of judgment. Because of that it is more convenient for this court to hear the two appeals together. In order to avoid any confusion we will refer to the parties as they were in the court below.

The first defendant through five separate sale and purchase agreements (hereinafter referred to as "the said sale and purchase agreements") purchased five units of apartments at D'Village Condominium erected on a piece of land held under main title known as Geran No. 11011, Lot No. 36, Section 51, Bandar Kuala Lumpur from Navistar Sdn. Bhd. and Syarikat Trimal Sdn. Bhd. The five units are known as:

(1) Unit No. 07-2C/I/G, 7th Floor, Block I;

(2) Unit No. 09-2B/II/B, 9th Floor, Block II;

(3) Unit No. 13-2B/II/B, 13th Floor, Block II;

(4) Unit No. 13A-2B/II/B, 13Ath Floor, Block II; and

(5) Unit No. 08-2B/II/I, 8th Floor, Block I.

The strata titles to these properties have not been issued in order to finance the said purchase, the first defendant took up a term loan of RM600,000 from the plaintiff to be repaid within ten years by monthly instalments of RM7,706. As security for the said loan both the first defendant and the

plaintiff entered into a loan agreement cum assignment with power of attorney to transfer or deal otherwise with the five units of apartments. Subsequent to that the term loan was increased from RM600,000 to RM700,000 repayable by monthly instalments of RM8,694 under the same terms and conditions originally given.

In November 1990, the plaintiff approved the following banking facilities to the second defendant:

(1) Letter of credit (sight) trust receipts (90) days of RM2 million;

(2) Trust receipt to include financing of D/P bills subject to sub-limit of RM500,000; and

(3) Foreign exchange contract (spot & forward) of RM2 million.

The security for the said facilities given was a loan agreement cum assignment over the said sale and purchase agreements with a power of attorney clause to transfer or deal otherwise with the subsequent second legal charge for the RM1 million when strata titles are available.

On 19 November 1990, the plaintiff granted a second loan in the sum of RM700,000 to the first defendant. As security for this loan a loan agreement cum assignment (hereinafter referred to as "the said agreement") was executed between the plaintiff and the first defendant whereby the first defendant absolutely assigned to the plaintiff all its rights and interest in and to the above-stated properties together with the full and entire benefit of the said sale and purchase agreements. Contemporaneously with the said agreement, the first defendant also executed a power of attorney whereby the first defendant appointed irrevocably, the manager of the plaintiff bank for the time being as the attorney of the first defendant.

It is to be noted that on 8 August 1992, the defendants sold Unit No. 08-2B/II/I, 8th Floor, Block I for the sum of RM245,000. It was alleged by the plaintiff that the unit was sold without its consent. Whether it is sold without consent or otherwise is not the concern of this appeal. As such only four units remained (hereinafter referred to as "the said property") as security for the loan and the facilities given which are the subject matter of these appeals.

The defendants failed to service the loans and the facilities. On 12 October 1992, the plaintiff through its solicitors demanded full payment of the loans and the facilities given to both defendants. The defendants failed to make any payment. As a result, on 22 August 1994 the plaintiff took out the

originating summons against both defendants seeking to sell the said property which were held as security for the said loans and facilities. The originating summons were taken out pursuant to O. 31 r. 1 of the Rules of the High Court 1980. In the originating summons the plaintiff prayed that an order be given that the said property Unit No. 07-2C/I/G, 7th Floor, Block 1; Unit No. 09-2B/II/B, 9th Floor, Block II; Unit No. 13-2B/II/B, 13th Floor, Block II and Unit No. 13A-2B/II/B 13Ath Floor, Block II in blocks of apartments called D'Village Condominium be sold by public auction.

Both defendants entered appearance. At the hearing of the originating summons the defendants raised preliminary objection on the ground that the prayer for sale under O. 31 r. 1 of the Rules of the High Court as contained in the originating summons was not correct. It was submitted by counsel for both defendants that the right procedure to sell the said property should be under O. 83 of the Rules of the High Court. The learned judge overruled the preliminary objection by the defendants and ordered that the said property be sold by public auction. The learned judge also ordered the defendants to pay costs.

Being dissatisfied with that decision the defendants now appeal to us. In her judgment dismissing the preliminary objection the learned judge came to the conclusion that this was not a charge action where O. 83 of the Rules of the High Court applied. She was of the opinion that the originating summons was an application by an assignee exercising its contractual remedy against the assignor in default. The assignee was suing for a debt, and its claim for an order for sale was based upon a covenant. Furthermore, the securities given were in the form of power of attorney as well as security relating to chose in action, that was an assignment of the first defendant's rights, benefits and interest in and under the loan agreement cum assignment, to wit four units of apartments, strata titles, in respect of them. She relied on the decision of *Hipparion (M) Sdn. Bhd. v. Chung Khiaw Bank Ltd.* [1989] 2 MLJ 149.

Before us the defendants adopted the same contention. The counsel for the defendants relied heavily on the decision of this court in *Phileo Allied Bank (M) Bhd. v. Bupinder Singh a/l Avatar Singh & Anor* [1999] 2 MLJ 157. It is to be noted when the decision in respect of these appeals were given, the learned judge did not have the benefit of the decision in *Phileo Allied Bank (M) Bhd. v. Bupinder Singh a/l Avatar Singh & Anor.*

Before us it was contended by the defendants that following the decision of *Phileo Allied Bank (M) Bhd*. the assignments by the defendants created equitable charges which could only be enforced by an application under O. 83 of the Rules of the High Court. Now, in that case the plaintiffs *(Bupinder Singh a/l Avatar Singh & Anor)* entered into a loan agreement cum assignment with the bank, in order to help finance the plaintiffs' purchase of a property. No strata title had been issued in respect of that property. Upon the plaintiffs' failure to service the required monthly repayments, the bank demanded repayment on the entire loan facility. The bank then took steps to sell the property by way of a public auction without giving any notice to the plaintiffs. The plaintiffs applied for injunction to prevent the bank from selling and/or transferring by public action, or otherwise from disposing of the property. It was contended by the plaintiffs in that case that since the assignment of the property constituted an absolute assignment of rights of a borrower to a financier where there is no title issued, the appropriate procedure that the bank ought to have adopted was to commence proceedings under O. 31 of the Rules of the High Court. Alternatively, it was submitted, if the court was to hold that the assignment is not an absolute assignment, then the bank ought to have commenced the proceedings under O. 83 of the Rules of the High Court. The defendant in that case argued that it had unfettered right to proceed to auction the property pursuant to the powers granted to it under a power of attorney. In that case, the High Court, following the decision of *Raju Jayaraman Kerpaya v. Chung Khiaw Bank Ltd.* [1997] 2 MLJ 590, held that when there is an absolute assignment of rights by a borrower to a financier and no title is issued, the appropriate procedure to be adopted by the financier to sell the property concerned would be to commence proceedings under O. 31 r. 1 of the Rules of the High Court. Being dissatisfied with that decision the bank appealed. In the Court of Appeal, Gopal Sri Ram, JCA, delivering the judgment of the court at pp. 162 and 163 identified the issue as follows:

> A short but important point of law has been raised in this appeal. At issue is the broad question whether a lender may, without obtaining an order of sale from the court, realize his security consisting of immovable property in respect of which there is no issue document of title and no registered charge.

At p. 165 the learned judge said:

The judgment under appeal

> In holding for the respondents, the learned judge proceeded upon three main grounds.

> *First*, it appears that he held that the power of attorney given by each respondent was invalid. I say 'appears' advisedly because the learned judge did not make a specific finding that the powers of attorney were invalid. What he did say was that he doubted their validity because the certificate of authentication in respect of each preceded the date of its grant by several months. However, when read in its proper context, what he obviously meant was that it was not open to the appellant to rely upon the powers of attorney to sell the subject property by public auction. ...
>
> *Second*, the learned judge, having held the assignment to be absolute, went on to hold that it was therefore incumbent for the appellant to apply for and obtain an order for sale pursuant to O. 31 r. l(l) of the Rules of the High Court 1980 ("the RHC"). The learned judge arrived at the latter conclusion based on his interpretation of the decision in *Chung Khiaw Bank Ltd v. Hipparion (M) Sdn. Bhd* [1988] 2 MLJ 62 (affirmed by the Supreme Court, sub nom *Hipparion (M) Sdn Bhd v. Chung Khiaw Bank Ltd* (1989) 2 MLJ 149) and *Raju Jayaraman Kerpaya v. Chung Khiaw Bank Ltd* (1997) 2 MLJ 590. He thought that these cases were authority for the proposition that a lender similarly circumstanced as the appellant, notwithstanding an express power of sale reserved to him in the contract of loan, can realize his security through a judicial sale. Third, the learned judge held that even if he were to hold the assignment not to be absolute, it created an equitable charge which was only enforceable by resort to the procedure laid down in RHC O. 83.
>
> In essence, the second and third findings of the learned judge constitute his reasons for resolving the sole issue in this case, identified very early in this judgment, in the respondent's favour. Before us, the appellant attacked both findings. It therefore becomes necessary, in order to determine the sole issue in the appeal, to address separately each reason advanced by the learned judge.

In the present appeal, it is clear to us that the defendants conceded that there was a power of attorney given by the defendants and that the assignments were absolute assignments. The defendants also conceded that the plaintiff has the right to go to the court to get an order of sale of the said property. The only complaint was that the plaintiff was wrong in seeking to sell the said property under O. 31 r. 1 of the Rules of the High Court. The proper procedure should be under O. 83 of the Rules of the High Court. It was submitted by counsel for the defendants that *Phileo Allied Bank (M) Bhd. v. Bupinder Singh a/l Avatar Singh & Anor* makes it clear that an assignment whether absolute or otherwise is an equitable mortgage which under our law is known as equitable charge. The learned counsel cited to us the passage by Gopal Sri Ram, JCA at p. 182:

> *Chuah Eng Khong v. Malayan Banking Bhd, being a decision of the present* Federal Court, is plainly binding upon this court in accordance with the doctrine of precedent. I think this court is equally obliged to accept the decision in

Malayan Banking Bhd v. Zahari bin Ahmad as it appears to have been approved sub silentio by the Federal Court in *Chuah Eng Khong*. Accordingly, I must respectfully decline Mr Royan's invitation to treat these cases as wrongly decided. These cases are authority for the proposition that an absolute assignment by a borrower of all his rights over immovable property that has no issue document of title to a lender as security for a loan is an equitable mortgage.

In the present instance, it was found by the learned judge and is common ground before us that the assignment is an absolute assignment of the respondents rights over the subject property to the appellant. The assignment therefore falls squarely within the proposition stated a moment ago. Accordingly, it is an equitable mortgage, also known as an equitable charge in the context of our Jurisprudence. On this ground alone, I must reject the appellant's contention that the assignment does not amount to an equitable charge.

We agree with the learned counsel for the defendants in the present appeal that the assignment being an absolute assignment is an equitable charge. But then the learned counsel tor the defendants went one step further when he submitted that since the assignment is an equitable charge then the proper procedure for the plaintiff to follow 'in order to sell the said properties should be under O. 83 of the Rules of the High Court. According to the learned counsel O. 83 of the Rules of the High Court is the correct and only procedure to be followed. Since the originating summons seeking to sell the land was under O. 31 r. 1 of the Rules of the High Court that procedure is wrong and it is fatal. He cited several passages from the judgment of Gopal Sri Ram, JCA in *Phileo Allied Bank (M) Bhd. v. Bupinder Singh a/l Avatar Singh & Anor* where at pp. 184 and 185 he said:

That brings me to the next question. Does the fact that the assignment is an equitable mortgage preclude the appellant from exercising its contractual power of sale. As I earlier mentioned, Mr Royan with his customary frankness, conceded that the question must be resolved against his client. He said that once this court accepted that the assignment was an equitable charge, the appellant could only sell the subject property under the authority of an order of the court obtained pursuant to RHC O. 83. This concession of counsel must now be tested for its accuracy, and if found to be correct, must be accepted.

The starting point for this exercise is an examination of RHC O. 83 rr. 1(l) and (2) of which read as follows:

(1) This order applies to any action (whether begun by writ or originating summons) by a charge or chargor or by any person having the right to foreclose or redeem any charge, being an action in which there is a claim for any of the following reliefs, namely -

(a) payment of moneys secured by the charge;

(b) sale of the charged property;

(c) foreclosure;

(d) delivery of possession (whether before or after foreclosure or without foreclosure) to the chargee by the chargor or by any other person who is or is alleged to be in possession of the property;

(e) redemption;

(f) reconveyance of the property or its reconveyance of the property or its release from the security;

(f) delivery of possession by the chargee.

(2) In this Order 'charge' includes a legal and an equitable charge.

A lender who has a charge (which by reason of r. 1(2) includes an equitable charge) must adopt the procedure laid down by O. 83 if he wishes to enforce his security. That, I think, is made abundantly clear by the opening words of RHC O. 83 r l(l). The lender is required to make an application by originating summons supported by an affidavit. He must serve the cause papers upon the chargor who is entitled to appear and be heard on the application. The chargor may oppose the lender's application on any of the admissible grounds. Or he may apply for redemption of the security. He may, if he fails at first instance, appeal to this court. His right to appeal is a substantive and not merely a procedural right. See *Lim Phin Khian v. Kho Su Ming* [1996] 1 MLJ 1. If he fails before this court, he may seek leave of the apex court to prosecute a further appeal.

It follows from what I have said thus far that the right, title and interest of a chargor in the charged property may not be extinguished save in accordance with the procedure prescribed by the RHC and after the chargor has exhausted his substantive riqhts of appeal. This is entirely consonant with the concept, of fairness which lies at the heart of our justice system. When viewed in this fashion, it is clear to my mind that RHC O. 83 is a procedural law that serves to protect the interests of a chargor.

Further down at p. 187, Gopal Sri Ram, JCA said:

While preparing this judgment, a point occurred to me which I think I ought to mention for completeness. It has do with the contractual power reserved to an equitable chargee in a deed of assignment to take possession of the charged property without an order of court. Such a power would, in my judgment, be void because it would *prima facie* run counter to the overall purpose of RHC

O. 83 which requires a chargee (whether registered or equitable) to move the court for an order for possession and, in such event, to comply with certain pre-requisites. This is apparent from the first three sub-rules to r 3 or 0 83 which read as follows:

(1) The affidavit in support of the originating summons by which an action to which this rule applies is begun must comply with the following provisions of this rule.

This rule applies to a charge action begun by originating summons in which the plaintiff is the chargee and claims delivery of possession or payment of moneys secured by the charge or both.

(2) The affidavit must exhibit a true copy of the charge and the original secured by the charge or, in the case of a registered charge, the charge certificate must be produced at the hearing of the summons.

(3) Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which right to possession arises except where the Court in any case or class otherwise directs, the state of the account between the chargor and chargee with particulars of -

(a) the amount of the advance;

(b) the amount of the repayments;

(c) the amount of any interest or instalments in arrear at the date of issue of the originating summons and at the date of the affidavit; and

(d) the amount remaining due under the charge. (Emphasis made.)

Yet, in *Chung Khiaw Bank Ltd Sdn Bhd v. Hippon (M) Sdn Bhd,* Edgar Joseph Jr. J, at first instance, upheld the plaintiff bank's exercise of its contractual power to terminate the defendant borrower's occupational licence and to enter upon the property in question and to deal with all its rights, title and interest in that property. It is apparent from his Lordship's judgment that counsel for Hipparion did not argue against the validity of the covenant for possession in the bank's favour. Neither was the point canvassed in the subsequent appeal to the Supreme Court. Hence, it finds no mention in the judgment of that court.

As we have stated earlier the defendants in the present appeal relied strongly on this especially in the statement by Gopal Sri Ram, JCA at p. 186 where he said:

In *Kimlin Housing Development Sdn. bhd. v. Bank Bumiputra (M) Bhd,* the Federal Court declared void a contractual power reserved in favour of a registered chargee to effect a sale of charged property on the ground that the express foreclosure provisions of the National Land Code could not be

> contracted out of or waived by the chargor. In my judgment, policy dictates that such a power in favour of an equitable chargee should be treated no differently. For otherwise, an equitable chargee would be placed in a better position than a registered chargee. Consequently, equality in treatment and parity of result is achieved by holding that an equitable chargor may not contract out of or waive the requirements of RHC O. 83. Such a conclusion will, in my view, prevent lenders from by-passing the requirements under the National Land Code, through the creation of equitable chargee, in order to gain an advantage they would clearly lack under statute.

It was contended by the defendants that this passage made it very clear that the procedure to realise any security under an equitable charge is in accordance with O. 83 of the Rules of the High Court. The chargee has no choice but to do so. Counsel for the defendants submitted further that the reason why O. 83 must be adopted is to enable the chargor to redeem the property before the order of sale is granted.

On the other hand counsel for the plantiff in the present appeal relied strongly on the decision of the then Supreme Court in *Hipparion (M) Sdn. Bhd. v. Chung Khiaw Bank Ltd*. [1989] 2 MLJ 149. In that case the plaintiff, a licensed bank, had on 3 September 1983 entered into an agreement with the defendant, whereby the plaintiff granted a loan of RM1 million to the defendant repayable with interest thereon at the rate of 13.5% per annum or at such rate as the plaintiff may specify, from time to time, in accordance with the terms and conditions specified in the said agreement. It was also provided in the said agreement that the defendant would remain in possession of a property known as the third floor of a building standing on holding 355, to a subdivision 14, north-east district, Penang, as a contractual licensee only of the plaintiff. It was further provided in the said agreement that in the event of default by the defendant of one or more of the instalment payments covenated to be made in the manner provided, the plaintiff was to be at liberty to demand immediate payment of the balance and in the event of any part of the same remaining unpaid after fourteen days from the date of such demand, the plaintiff would have the right to terminate the license of the defendant by notice in writing and to enter upon the property and to deal with all its rights, title and interest as owner thereof in all respects as the person absolutely and beneficially entitled thereto, including the right and power to sell or to transfer such right, title and interest at such price and in such manner and subject to such conditions as the plaintiff shall in its absolute discretion deem fit free from any interest of the defendant. By way of security for the loan the defendant

also executed a deed of assignment dated 3 September 1983 whereby it assigned absolutely to the plaintiff all its rights, title and interest in the said property and in respect of a sale and purchase agreement dated 13 April 1981 whereby the defendant had bought the same property from a company called Penang Garden Sdn. Bhd. The defendant defaulted in making payments due under the said agreement and the plaintiff through its solicitors issued a notice in writing on 14 August 1985 demanding repayment of the loan together with accrued interest thereon within fourteen days from the date of demand. The plaintiff further issued another notice in writing that if its demand aforesaid was not complied with, it would exercise its rights of sale over the property. The plaintiff commenced proceedings by way of originating summons seeking a declaration that the sum due and owing by the defendant and also an order under O. 31 r. 1 that the said property be sold by public auction and/or by private treaty.

In the High Court, Edgar Joseph Jr. J. (as he then was) [1988] 2 MLJ 62 at pp. 64 and 65 said:

> The defendant's right to possession of the property vis-a-vis the developer is an incident of his rights and benefits under the sale and purchase agreement (under which the defendant was the purchaser and the developer the vendor), which right had been assigned to the plaintiff under the assignment. Thereafter, the defendant's right to possession subsequent to the execution of the assignment depended entirely upon the contractual licence granted to him by the plaintiff. As has already been noted by clause 12(a) of the loan agreement the plaintiff was entitled by written notice to terminate such licence in the event of default by the defendant in making the payment specified therein. There having been such default by the defendant - and as to this there never has been any dispute - the plaintiff had lawfully exercised its right to terminate the licence and, in the words of the loan agreement, was entitled "to enter upon" the property "and to deal with all the right, title and interest of the bank in relation to or as the case may be" the property "arising out of the beneficial ownership by the bank of" the property" or, the registration of the bank as the owner of" the property "or, otherwise, in all respects as the person absolutely and beneficially entitled thereto..."
>
> If, on the other hand, the security constituted by the documents concerned is a security relating to land, it is still a valid security. The requirements of the National Land Code, which concern the creation of a security in respect of land held under registered title, are without application in the present case, as the property is not as yet held under a registered title. In this context, s. 205(1) of the National Land Code is relevant and provides as follows:

> The dealings capable of being effected under this Act with respect to alienated lands and interest therein shall be those specified in Parts Fourteen to Seventeen and no others.

> For the definition of the expression "alienated land" I would refer to section 5 of the National Land Code which describes "alienated land" as "any land (including any parcel of subdivided building) in respect of which a registered title for the time being subsists". Then, s. 206(3) of the National Land Code serves to remind us that "nothing in subs. (1) shall affect the contractual operation of any transaction relating to alienated land or any interest therein". It follows, therefore, that the defendant's submission that a claim to enforce a security given by way of assignment cannot put the claimant in a better position than one who seeks to enforce a charge registered as a Form 16 charge under the National Land Code is untenable.

> Looking back, I would hold that the assignment was not by way of charge only but an absolute assignment. The letter of offer dated August 9, 1983, exhibited to the affidavits of Chean Ah Bee, the secretary of the defendant, affirmed to on March 25, 1987 (enclosure 12) and the charge in escrow referred to in the letter of offer merely demonstrated that the assignment was by way of security designed to give the defendant an equitable right of reassignment upon repayment of the loan secured thereby. It has been settled by plentiful authority that an assignment in such circumstances is nonetheless absolute. ...

Then, further down at p. 66 his Lordship concludes as follows:

> Accordingly, the security concerned, being a security relating to a chose in action, that is to say, an assignment of the defendant's rights, benefits and interest in and under the sale agreement of the property, to wit, a parcel of a subdivided building, strata in respect of which is yet to be issued, this court has jurisdiction under section 41 of the Specific Relief Act 1950 and/or it has inherent jurisdiction to grant the declaration prayed for by the plaintiff and an order for sale of the property consequential thereto.

> If, contrary to my primary opinion, the security herein is not a security relating to a chose in action but a security relating to land, then I would hold that this court has jurisdiction under Order 31 rule l(1) of the Rules of High Court 1980 (adapted from Order 51 of the English rules of the Supreme Court 1965) to make an order for sale of the property: see *Oldham v. Stringer*.

Being dissatisfied with that decision the defendant in that case appealed to the then Supreme Court. The Supreme Court dismissed the appeal, [1989] 2 MLJ 149. At p. 151, Gunn Chit Tuan, SCJ (as he then was) delivering the judgment of the court said:

We would point out that in this case we are not concerned with a contract of guarantee as the Federal Court was in the *Citibank's* case but with a deed of assignment. We would therefore reiterate what this court has said in *Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd* that 'whether or not an assignment is an absolute one (not purporting to be one by way of charge only) within the meaning of s. 4(3) of the Civil Law Act 1956 is to be gathered only from the four corners of the instrument itself. Now, whatever the parties might have as laymen stated in their correspondence between themselves, they had elected to have the assignment executed in the form of a legal document signed by both parties on 3 September 1983. After reciting (a) that the sale and purchase agreement dated 13 Apri1 1981, made between Penang Garden Sdn Bhd of the one part and the defendant as the assignor on the other part, the former sold and the defendant purchased the said property. By that agreement the former also undertook to take all reasonable steps to obtain a subsidiary title to it; and (b) that the defendant has requested the plaintiff as assignee to grant it a loan of $1m to enable it to complete the purchase of the said floor, the assignment was executed in the following terms:

> In consideration of the assignee having agreed to grant the said loan the assignor as beneficial owner hereby assigns absolutely to the assignee, all his right title and interest in and to the property and under the said agreement and the full benefit granted thereby and all stipulations therein contained and all remedies for enforcing the same.

Looking at the document *we agreed with the conclusion of the learned judge that the deed was an absolute assignment and not purporting to be by way of charge only within the meaning of s. 4(3) of the Civil Law Act, 1956. The deed clearly purports, and is intended in point of form to be an absolute assignment because of the use of the word "absolutely'. The intention of the parties clearly was that it should be absolute in the sense that the assignee should have all the rights, title and interest of the assignor in the sale and purchase agreement. A document given 'by way of charge' is not one which absolutely transfers the property.* As we have come to the conclusion that was an absolute assignment we did not think it necessary to consider the contention of counsel that an equitable charge was made in this case. ... (Emphasis made.)

In our view the Supreme Court made it very clear that when there is an absolute assignment there is no necessity for the court to determine whether an assignment is an equitable charge or not. The determination of the assignment to be an equitable charge is for the purpose of bringing that assignment to be a charge within the meaning of s. 4(3) of the Civil Law Act 1956. Where the assignment is an absolute one the assignee should have all the rights, title and interest of the assignor in the sale and purchase agreement. In other words the rights, title and interest of assignor in respect

of property under the sale and purchase agreement is transfered to the assignee. As such the assignee can do anything to tire property once notice of default and notice to remedy has been given to the assignor. The Supreme court made it clear that "a document given 'by way of charge' is not one which absolutely transfers the property". As such an absolute assignment is in a stronger position than a charge. For those reasons the Federal Court decided that a sale of property under an absolute assignment by way of O. 31 of the Rules of the High Court was the proper and correct procedure.

In the present appeal it is clear to us that there is no dispute that the assignment was an absolute assignment. The facts in this appeal if not identical are similar to the facts in *Hipparion (M) Sdn Bhd. v. Chung Khiaw Bank Ltd.* [1989] 2 MLJ 149. That decision, being a Supreme Court (the then Federal Court) decision, is binding on this court. It is to be noted that *Phileo Allied Bank v. Bupinder Singh a/l Avatar Singh & Anor* [1999], 3 MLJ l57 is a decision of this court. Further, the facts in *Bupinder Singh a/l Avatar Singh & Anor* were different in that the bank in that case did not obtain an order of the court for the sale of the subject property. For that reason the owner challenged the sale and succeeded. It is true that the Supreme Court did not decide that an absolute assignment is not an equitable charge as pointed out by Gopal Sri Ram, JCA but what was pointed out by the Supreme Court was that an absolute assignment ranked higher than a charge because a charge is not one which absolutely transfers the property if the chargor defaulted whereas in the case of an absolute assignment the property is transferred absolutely when the assignor defaulted. In our view the conclusion by Gopal Sri Ram, JCA in *Bupinder Singh a/l Avatar Singh & Anor:*

> ... In my judgment, policy dictates that such a power in favour of an equitable chargee should be treated no different. For otherwise, an equitable chargee would be placed in a better position than a registered chargee. ...

is not applicable in the case of an absolute assignment as pointed out by the Supreme Court in *Hipparion (M) Sdn. Bhd.*

Counsel for the appellant also cited *Chuah Eng Khong v. Malayan Banking Bhd.* [1998] 3 MLJ 97 to support his contention. The issue in that case was totally different from the issue in the present appeal. The issue in that case was whether the loan agreement tantamount to an equitable mortgage and the bank is entitled to claim the interest accruing under the loan agreement. In the present appeal the issue is whether the respondent is right

going under O. 31 to effect sale of the subject property. Appellant also cited *Malayan Banking Berhad v. Zahari bin Ahmad* [1988] 2 MLJ 13. This is a High Court decision. That case could easily be distinguished from the present appeal in that there was no absolute assignment. The claim by the bank is based entirely on a loan agreement. As stated in the case of *Bupinder Singh a/l Avatar Singh & Anor* to which we agree such document tantamount to an equitable charge and the proper procedure to sell the land is under O. 83 and not under O. 31. In *Mehadevan & Anor v. Manilal & Sons (M) Sdn. Bhd.* [1984] I MLJ 266, the issue was whether an equitable charge could be created on the property of a deceased person for money advanced to him in his lifetime which was not repaid. As such it is not relevant to the present appeal. Appellant also cited the recent decision of the Federal Court in *Koperasi Rakyat Bhd. v. Harta Empat Sdn Bhd.* [2000] 3 MLJ 83. Again we find that, that case has no application to the present appeal because the issue in that case was a third party charge.

As such it is clear to us that an assignment (whether absolute or otherwise) is an equitable mortgage as decided by *Phileo Allied Bank (M) Bhd. v. Bupinder Singh a/l Avatar Singh & Anor* [1999] 3 MLJ 157. But when it is an absolute assignment it ranks higher than a charge and the property is transferred absolutely to the assignee when the assignor defaulted in making repayments. The assignee can proceed to sell the property under O. 31 of the Rules the High Court. (See *Hipparion (M) Sdn. Bhd. v. Chung Khiaw Bank Ltd.* [1989] 2 MLJ 149). We wish to add that in our view there is no harm if the assignee elects to sell the property under O. 83 of the Rules of the High Court.

Another issue taken up by the appellants was that if the sale is to be proceeded under O. 31 of the Rules of the High Court, then the appellants were put at a great disadvantage in that they would not have the opportunity to redeem the property as provided for by O. 33 of the Rules of the High Court. We are not impressed with this argument. It is clear to us that in the present appeal the respondent as assignee had given the proper notice of default and redemption to the appellants. Appellants failed to make good of the amount due. Perusing O. 31 and O. 83 of the Rules of the High Court is clear to us that distinction between the two orders is that under O. 83 there is a requirement for the chargee to claim possession first before an order for sale. This is what Gunn Chit Tuan SCJ (as he then was) in *Hipparion (M) Sdn Bhd. v. Chung Khiaw Bank Ltd.* said (at p. 151): "A document 'given by way of charge' is not one which absolutely transfers the property, ...".

As to the order for sale it is clear to us that whatever conditions and directions as to the sale which are applicable to O. 31. are applicable to a sale under O. 83. This is so by virtue of O. 31 r. 4 which provides:

> O. 31 r. 4 Charge, exchange or partition under order of the Court
>
> Rules 2 and 3 shall, so far as applicable and with necessary modifications, apply in relation to the charge, exchange or partition of any immovable property under an order of the court as they apply in relation to the sale of any immovable property under such an order.

Thus, even if the sale is to be made under O. 83 the manner of carrying out the sale and result of the sale shall be in accordance with O. 31 rr. 2 and 3.

We are of the view that the plainiff in the present appeal was right in applying for sale of the property under O. 31 because of the absolute assignment and the irrevocable power of attorney. From the record it is clear that the defendant did not dispute the fact that the assignment was an absolute assignment. The learned trial judge was right in granting the order for sale under O. 31 of the Rules of the High Court.

The appeal is hereby dismissed with costs. Deposit to account of taxed costs.